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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1272

ROGER NOALL, as Executive Vice President of
Bunge Corporation

Petitioner,

v.

UNITED STATES OF AMERICA and
FELIX KARUL, Revenue Agent of
the Internal Revenue Service

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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In their responding memorandum, the United States does not address, and apparently concedes, the arguments set forth by Bunge Corporation ("Bunge") for granting a writ of certiorari in this matter. Instead, the United States confines its opposition to an argument that the case is moot. The case is not moot because: (1) a determination that the requested documents are not relevant will affect the use of those documents in later proceedings, and (2) the dispute represents a recurring controversy which would otherwise continue to evade review by this Court.

The Third Circuit in *United States* v. *Friedman*, 532 F.2d 928 (3rd Cir. 1976) (a case not cited and apparently ignored by the United States) has held that notwithstanding compliance with an order enforcing an Internal Revenue Service summons, an appeal challenging the summons is not moot since a ruling in favor of the taxpayer could affect the subsequent use of the documents at issue:

> If the taxpayers were to prevail in their contention that all summonses were illegal . . ., then the records acquired . . . would have been obtained unlawfully. Such a ruling could affect the possible use of these records in any subsequent criminal or civil proceeding brought against the taxpayers. *United States* v. *Friedman*, *supra*, at 931.

The cases cited by the United States do not involve documents which are kept annually by the taxpayer and which represent a potentially recurring controversy with the United States for other taxable years, such as Bunge's corporate internal audit reports.*

A case, like the instant one, is not moot if it is "capable of repetition, yet evading review." *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). This doctrine has been reformulated as the combination of two elements: (1) the challenged action was too short to be fully litigated prior to its cessation, and (2) there is a reasonable expectation that the same complaining party would be subject to the same action again. See *Securities and Exchange Commission* v. *Sloan*, 436 U.S. 103, 109 (1978); *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975).

*The hardship wrought upon the petitioner in this controversy is exacerbated by the repeated refusals of the United States to agree to stays of the court orders, which coupled with the summary nature of these proceedings will continue to render ultimate appellate review impossible.

In the context of the summary proceeding of the enforcement of the summons in the instant case, the action will be too short to be fully litigated, thereby satisfying the first element. Moreover, there is a reasonable expectation that the Internal Revenue Service will again summon Bunge's internal audit reports, as such reports exist for taxable years still open to review by the Internal Revenue Service. Accordingly, the current dispute is not moot.*

In light of the factors detailed above, the United States' sole objection to the writ of certiorari is without foundation. Accordingly, such writ should be granted.

Respectfully Submitted,

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*Contrary to the impression created by the United States on page 1 of their Memorandum, the summons in question requested not only the internal audit reports and related work papers "pertaining to Bunge Corporation's federal income tax liabilities" but *all* such reports for the years in question. Furthermore, despite the statement by the United States in its Memorandum, there has not yet been full compliance with the order of the district court. The testimony requested by the Internal Revenue Service in the summons has not yet been taken. This same partial non-compliance led the court in *United States* v. *Friedman*, supra at 931, to hold that the case was not moot.